

Appellate Court No. H021961

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

MATTHEW PAVLOVICH,)	Supreme Court No. S100809
)	
Petitioner,)	
)	
vs.)	
)	Trial Judge: Hon. William J. Elfving
SUPERIOR COURT OF THE STATE))	Santa Clara County Superior Court
OF CALIFORNIA FOR THE)	Trial Court Case No. CV 786804
COUNTY OF SANTA CLARA,)	
)	
Respondent.)	
)	
DVD COPY CONTROL)	
ASSOCIATION, INC.,)	
)	
<u>Real Party in Interest.</u>)	

**BRIEF OF AMICI CURIAE
THE COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION
AND
THE STUDENT PRESS LAW CENTER
IN SUPPORT OF PETITIONER MATTHEW PAVLOVICH**

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INTEREST OF AMICI

The Computer & Communications Industry Association (“CCIA”; website at www.ccianet.org) is an association of computer, communications, Internet and technology companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA’s members include a diverse array of equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and on-line services, resellers, systems integrators, and third-party vendors. Among them are Sun Microsystems, Fujitsu, United Parcel Service, Oracle, Kodak, Nokia, Intuit, and Yahoo!. Its member companies employ nearly one million people and generate annual revenues exceeding \$300 billion. CCIA’s mission is to further the interests of its members, their customers, and the industry at large by serving as the leading industry advocate in promoting open, barrier-free competition in the offering of computer and communications products and services worldwide.

CCIA’s members both large and small conduct a wide variety of activities on and off the Internet at various locations throughout the world. As they manage their businesses, it is important that they be able to anticipate and control their potential liabilities by choosing where they wish to do business and the jurisdictions in which they will be subject to suit. The Court of Appeal’s expansion of the scope of personal jurisdiction undermines that certainty and predictability of jurisdiction, especially with respect to the jurisdictional consequences of information published on the Internet, to the detriment of businesses everywhere.

The Student Press Law Center (“SPLC”; website at www.splc.org) is a national, nonprofit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and

preserving the free press rights of student journalists. As the only national organization devoted exclusively to this purpose, the SPLC has collected information on student media cases nationwide and has submitted numerous amicus curiae briefs before state and federal courts.

The student journalists and publications whose interests SPLC represents include those who publish online. Many student journalists and publications have extremely limited financial resources, and the burden of defending a lawsuit in a distant forum to which they have no connection would be a substantial chilling effect to their journalistic vigor and independence. The Court of Appeal's radical expansion of the scope of personal jurisdiction, especially for information published on the Internet, thus represents a real threat to these journalists and publications and to their free press rights.

INTRODUCTION

At issue in this case is whether a California court may exercise specific personal jurisdiction over an Indiana college student, Matthew Pavlovich, for a claim that information posted without any commercial purpose on an Internet web site with which he was associated was a misappropriation of plaintiff's alleged trade secrets. At the time of the posting, the alleged trade secrets were owned by plaintiff's predecessor-in-interest, a Japanese entity; there is no evidence in the record of any effects of the posting in California, only unspecified and unproven alleged injuries to unidentified businesses that are not parties to any litigation against the student; and Mr. Pavlovich has no personal or commercial contacts with California.

In reaching its conclusion that jurisdiction exists over Mr. Pavlovich in this action, the Court of Appeal regrettably committed a number of fundamental errors in its analysis, errors that conflict both with the clear weight of authority that has developed in Internet jurisdiction cases and with more fundamental principles of jurisdiction. The Court of Appeal's decision greatly distorts the law of personal jurisdiction as it applies to conduct occurring both on and off the Internet and should be reversed.

FACTUAL BACKGROUND

Defendant Matthew Pavlovich's petition for review arises out of the following circumstances:

In October 1999, at the time of the events giving rise to this litigation, Mr. Pavlovich was an Indiana college student. (He has since moved to Texas.) Mr. Pavlovich participated in the operation of an Internet web site on which a computer program called DeCSS was posted. Neither Mr. Pavlovich nor any other person had any commercial purpose in permitting DeCSS to be posted on the web

site and neither he nor anyone else derived any revenue or other commercial advantage from doing so.

Plaintiff DVD Copy Control Association (DVD CCA) alleges that DeCSS misappropriates trade secrets in a computer program known as CSS which is used to encrypt DVD movie disks. At the time DeCSS was posted on the Internet in October 1999, however, DVD CCA had no rights in the CSS program; instead, rights to CSS were possessed by a Japanese entity, the CSS Interim Licensing Organization located in Osaka, Japan. DVD CCA did not acquire any rights in CSS until about a week before it filed its complaint in this action on December 27, 1999. Mr. Pavlovich was unaware of the existence of DVD CCA at the time DeCSS was posted on the web site.

ARGUMENT

I. Specific Jurisdiction Exists Only If A Nonresident Defendant Purposely Avails Himself Or Herself Of Some Benefit Of The Forum

As a matter of federal constitutional due process, personal jurisdiction by a California court over a nonresident defendant may either be “general” or “specific.” If the nonresident’s contacts with the state are substantial, systematic, and continuous, general jurisdiction exists and the nonresident is subject to suit in California whether or not the subject matter of the lawsuit has any relation to California. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-446, citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462.) As the Court of Appeal concluded and as DVD-CCA concedes, Mr. Pavlovich’s contacts with California are manifestly too insubstantial to support general jurisdiction over him.

“If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the *specific* jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits and the ‘controversy is

related to or “arises out of” a defendant’s contacts with the forum.’ ” (*Vons Companies, supra*, 14 Cal.4th at 446, italics original, citations omitted.) At issue in this case is whether DVD CCA has proven that Mr. Pavlovich purposely availed himself of some benefit of California sufficiently to justify specific jurisdiction over him.

DVD CCA, however, ignores the rule this Court set forth in *Vons* requiring that the defendant purposefully avail himself or herself of some forum benefit, neither citing the rule nor making any attempt to demonstrate that it has been satisfied. Instead, DVD CCA erroneously asserts, as did the Court of Appeal, that purposeful availment requires nothing more than that “a defendant’s intentional conduct causes harmful effects within the state.” (DVD CCA Br. at 17, see Ct. of App. Op. at 11).

This is not the law. To the contrary, both the United States Supreme Court and this Court have made clear that the mere fact of causing injury within another state, even a foreseeable injury, is insufficient by itself to establish jurisdiction: “Foreseeability of causing *injury* in another State . . . is not a ‘sufficient benchmark’ for exercising personal jurisdiction.” *Burger King, supra*, 471 U.S. at 474 (italics original). Instead, “ ‘[i]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’ ” *Id.* at 475; accord *Kulko v. Superior Court* (1978) 436 U.S. 84, 96 (“In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court’s reliance on appellant’s having caused an ‘effect’ in California was misplaced.”).

This Court has likewise held that specific jurisdiction exists only if the nonresident defendant “purposefully has availed itself of forum benefits.” (*Vons Companies, supra*, 14 Cal.4th at 446.) “[I]t is the defendant’s choice to take

advantage of opportunities that exist in the forum that subjects it to jurisdiction.” (*Id.* at 458.) The quintessential forum benefit, of course, is conducting commercial activity within the forum. (See *Burger King, supra*, 471 U.S. at 473-474, 476; *Vons Companies, supra*, 14 Cal.4th at 446-447.)

II. The Internet Cases Establish That The Mere Posting Of Information On The Internet Is Insufficient To Create Jurisdiction In The Absence Of The Defendant’s Purposeful Availment of Some Forum Benefit

The principles of specific jurisdiction, and in particular the requirement that a nonresident defendant have purposely availed himself or herself of some forum benefit, have been applied in a number of cases addressing the circumstances in which activities conducted by a nonresident on the Internet may give rise to jurisdiction in a distant forum. These Internet jurisdiction cases have evolved a sensible rule: the mere posting of information on the Internet does not subject the person posting the information to jurisdiction everywhere in the world the information may happen to be read or to cause harm. Instead, as in every other jurisdiction case, before jurisdiction can be exercised the defendant must have purposefully sought out some benefit from the forum, most typically by conducting commercial activity with residents of the forum.

The United States Court of Appeals for the District of Columbia Circuit, after reviewing a number of Internet jurisdiction cases, aptly described how the principles of specific jurisdiction apply in the context of the Internet in *GTE New Media Srvs. Inc. v. BellSouth Corp.* (D.C. Cir. 2000) 199 F.3d 1343, 1349-1350: “[P]ersonal jurisdiction surely cannot be based solely on the ability of [forum] residents to access defendants’ websites . . . [¶] . . . [¶] When stripped to its core, [plaintiff’s] theory of jurisdiction rests on the claim that, because the defendants have acted to maximize usage of their websites in the [forum], mere accessibility of the defendants’ websites establishes the necessary ‘minimum contacts’ with this forum. . . . This theory simply cannot hold water. Indeed, under this view,

personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction. The Due Process Clause exists, in part, to give ‘a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’ *World-Wide Volkswagen Corp.*, 444 U.S. at 297. In the context of the Internet, [plaintiff’s] expansive theory of personal jurisdiction would shred these constitutional assurances out of practical existence. Our sister circuits have not accepted such an approach, and neither shall we.”

The leading Internet jurisdiction case in our Courts of Appeal adheres to this same rule. In *Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045 (a decision the Court of Appeal in Mr. Pavlovich’s case never cited, much less distinguished), the nonresident defendants operated an allegedly libelous web site on a California computer server. The court held that the “defendants’ conduct in registering [the plaintiff’s] name as a domain name and posting passive Web sites on the Internet is not sufficient to subject them to jurisdiction in California. Creating a site, like placing a product into the stream of commerce, may be felt nationwide--or even worldwide--but, without more, it is not an act purposefully directed toward the forum state.” *Id.* at 1060 (citations and internal quotations omitted).

The Ninth Circuit, too, has reached the same conclusion. After reviewing the case law, it stated: “[N]o court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff’s home state. . . . [¶] . . . [¶] . . . [¶] In sum, the common thread [in the cases] . . . is that ‘the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of *commercial* activity that an

entity conducts over the Internet.’ ” (*Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414, 418-419 (italics added).)

Here, there was no commercial activity either in California or elsewhere in connection with the web site on which DeCSS was posted, no other commercial activity by Mr. Pavlovich connected to California, and no other conduct by which he purposely availed himself of any benefit of California. Nor does DVD CCA contend that Mr. Pavlovich purposely availed himself of any benefit provided by California. Accordingly, there is no jurisdiction over Mr. Pavlovich in California. (See *Burger King, supra*, 471 U.S. at 474-475; *Vons Companies, supra*, 14 Cal.4th at 446, 458.)

Also supporting this conclusion is the United States Supreme Court’s plurality decision in *Asahi Metal Industry Co., Ltd. v. Superior Court* (1987) 480 U.S. 102, which concluded that merely putting a product into the stream of commerce did not create jurisdiction in every forum where the product was sold: “The ‘substantial connection,’ between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” (*Asahi Metal Industry Co., Ltd. v. Superior Court, supra*, 480 U.S. at 112, plurality opinion, italics original, citations omitted.)

Asahi's reasoning holds equally true for information made available globally through the Internet as it does for products made available globally by being placed into the stream of commerce. Releasing information into the global "stream of communication" of the Internet's World Wide Web, as Mr. Pavlovich did, is not an act purposefully directed toward California and is insufficient to support jurisdiction. (Accord, *Jewish Defense Organization, Inc. v. Superior Court*, *supra*, 72 Cal.App.4th at 1060.)

III. The Court Of Appeal's Decision Erroneously Expanded The Scope Of Personal Jurisdiction Beyond The Limits Of The Due Process Clause And Conflicts With The Decisions Of This Court And Other Courts

By ruling that jurisdiction exists over Mr. Pavlovich in this case, the Court of Appeal rejected the Internet jurisdiction rule and the entire line of cases supporting it, including *Jewish Defense Organization*. Under the Court of Appeal's exponential expansion of jurisdiction, every posting of information on the Internet subjects the person posting the information to universal jurisdiction, for such persons are no different than Mr. Pavlovich: "Pavlovich knew, or should have known, that by posting the misappropriated information on the Internet, he was making the information available to a wide range of Internet users and consumers throughout the Internet world, including users and consumers in California. [¶] Accordingly, there is a sufficient showing of 'purposeful availment'" (Ct. of App. Op. at 11.)

The Court of Appeal distorted the purposeful availment standard in another significant respect as well. Its adoption of a "knew or should have known" (Ct. of App. Op. at 11) negligence standard to define the mental state for a defendant's jurisdictional acts further demonstrates its misreading of the "purposeful availment" requirement, for negligent acts need not be purposeful.

Even more disastrously, the Court of Appeal also rejected the more fundamental principle, repeatedly reaffirmed by both this court and the United

States Supreme Court, that specific jurisdiction exists only if the nonresident defendant “purposefully has availed itself of forum benefits.” (*Vons Companies, supra*, 14 Cal.4th at 458.) The Court of Appeal never identified any *benefit* of California of which Mr. Pavlovich had purposely availed himself. Rather, it frankly dispensed with the requirement that it identify some such benefit. Instead, it held that causing some alleged but unspecified harm to some unidentified nonparty sufficed to establish jurisdiction, stating that “the ‘purposeful availment’ requirement is satisfied where a defendant’s intentional conduct causes harmful effects within the state,” without any other contacts. (Ct. of App. Op. at 11.)

As set forth above, this is not the law in Internet cases or in any other cases. Jurisdiction does not exist merely because out-of-state conduct results in harm within a state. Rather, as this Court reiterated only six years ago, “it is the defendant’s choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction.” (*Vons Companies, supra*, 14 Cal.4th at 458.)

IV. *Calder v. Jones* Is A Commercial Activity Case That Has No Application To Mr. Pavlovich Because He Had No Commercial Contacts With California And Did Not Participate In Any Entity With Commercial Contacts With California

Both the Court of Appeal and DVD CCA base their erroneous jurisdictional analysis on a misguided reading of *Calder v. Jones* (1984) 465 U.S. 783. In that case, a California resident sued in California a Florida newspaper, the National Enquirer, its Florida president/editor, and one of its Florida reporters for an allegedly libelous article written by the reporter, edited by the president/editor, and distributed by their newspaper in California, the newspaper’s largest market. *Id.* at 785-786. There was no dispute that the newspaper’s commercial sales in California were a purposeful availment of the benefits of doing business in California sufficient to subject the newspaper to California’s jurisdiction. At issue instead was whether jurisdiction existed over the president/editor and the reporter

by virtue of their use of the newspaper and its California presence as an instrumentality for intentionally causing harm to someone within California.

As the United States Supreme Court made clear in a later case (*Burger King, supra*, 471 U.S. 462), *Calder* is a run-of-the-mill commercial activity case: what subjected the president/editor and reporter in *Calder* to jurisdiction was the commercial benefit derived from California through the newspaper's distribution and sale in the state, coupled with their control over the newspaper's activities. "We have previously noted that when *commercial activities* are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party, *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), at least where he is a 'primary [participant]' in the enterprise and has acted purposefully in directing those activities, *Calder v. Jones*, 465 U.S., at 790." (*Burger King, supra*, 471 U.S. at 481, italics added.) "So long as a *commercial actor's* efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc., supra*, at 774-775; see also *Calder v. Jones*, 465 U.S., at 788-790; *McGee v. International Life Insurance Co.*, 355 U.S., at 222-223." (*Id.* at 476, italics added.)

This Court, too, understands that *Calder* is a commercial activity case establishing that for purposes of jurisdiction "corporate veils may be pierced" to attribute a corporation's contacts with the forum to those who stand behind the corporation and use it as an instrumentality to intentionally cause a harm expressly aimed at the forum. (*Vons Companies, supra*, 14 Cal.4th at 458 n. 7.) It is the corporation's choice to serve the forum's market coupled with the defendant's choice to use the corporation to cause a harm aimed at some person within the forum that creates jurisdiction.

Moreover, it is as true under *Calder* as it is under any other form of jurisdictional analysis that the mere fact an intentional tort causes injury in the

forum state is insufficient standing alone to create jurisdiction. As the United States Court of Appeals for the Third Circuit has held: “Nor did *Calder* carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state. . . . [¶] Accordingly, we . . . agree with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits that jurisdiction under *Calder* requires more than a finding that the harm caused by the defendant’s intentional tort is primarily felt within the forum.” (*IMO Industries, Inc. v. Kiekert AG* (3d Cir. 1998) 155 F.3d 254, 265.)

Because *Calder* is a commercial activity case, it has no application here. Mr. Pavlovich was not engaged in commercial activity, was not directing any other entity that was carrying on commercial activities, and was not receiving any benefit from activities conducted in California.

V. The Complete Absence Of Any Evidence Of The Alleged Harms To Nonparties That DVD CCA Contends Mr. Pavlovich Caused Precludes Any Assertion Of Jurisdiction Over Him

Even if causing harm to a nonparty forum resident were alone sufficient to create jurisdiction in the absence of any forum benefit to the defendant, the record here would still not support jurisdiction. In opposing Mr. Pavlovich’s motion to quash for lack of jurisdiction, DVD CCA, contrary to its assertion in its brief, may not merely rest on the allegations of its unverified complaint. (DVD CCA Br. at 18). Rather it bears the “burden of demonstrating *facts* justifying the exercise of jurisdiction.” (*Vons Companies, supra*, 14 Cal.4th at 449, italics added.) The record here is absolutely bereft of any *evidence*, as opposed to rhetorical assertion, of the alleged harm to nonparties on which the Court of Appeal founded jurisdiction.

The Court of Appeal held that a defendant’s mere suspicion or, even less, a defendant’s negligent failure to realize that his or her conduct would cause unproven effects on nonparties whose principal place of business is asserted to be

within the forum was a sufficient basis for jurisdiction: “Because Pavlovich knew that California is commonly known as the center of the movie industry, and knew that Silicon Valley in California is one of the top three technology ‘hot spots’ in the country, he knew, or should have known, that the DVD republishing and distribution activities¹ he was illegally doing and allowing to be done through the use of his Web site, while benefiting him, were injuriously affecting the motion picture and computer industries in California.” (Ct. of App. Op. at 10.)

DVD CCA, however, is the only plaintiff in this action; none of the businesses who are members of the movie and computer industries are parties to this action. The Court of Appeal never identified, nor is there any record evidence of, either any specific harm allegedly caused to these nonparties by Mr. Pavlovich’s conduct or any specific nonparty injured as a result of his conduct. Nor is there any evidence that these alleged injuries, if they occurred, occurred primarily in California. Instead, the Court of Appeal relied on nothing more to justify jurisdiction than its own conclusory and unsupported assertion that Mr. Pavlovich’s out-of-state posting of DeCSS was “injuriously affecting the motion picture and computer industries in California” (Ct. of App. Op. at 10).

This case is thus not like *Vons Companies*, where this Court held that the purposeful ongoing *contractual* relationship established by the defendant and a California third party created the necessary contacts with California to support jurisdiction. “When . . . the defendants sought out and maintained a continuing *commercial* connection with a California business, it is not necessary that the claim arise directly from the defendant’s contacts in the state.” (*Vons Companies*, *supra*, 14 Cal.4th at 453, italics added.) Here, the Court of Appeal relied instead

¹ Contrary to the Court of Appeal’s assertion, there is no allegation, much less any evidence, by DVD CCA that Mr. Pavlovich or the web site with which he was associated published or distributed any DVD movies. DVD CCA alleges only that DeCSS, an independent computer program not developed or owned by it, was posted on the web site.

on unproven and hypothetical economic effects on third parties with whom Mr. Pavlovich had no commercial connection.

Despite its overwrought doomsday rhetoric, DVD CCA never identifies the precise nature of the injuries it alleges have been suffered by the movie industry, the computer industry, and the consumer electronics industry. And for good reason, because doing so would reveal both that it has never presented any *evidence* of such injuries and that, even assuming the existence of these unproven injuries, they would not satisfy even DVD CCA's own lax and misguided jurisdictional test.²

The Movie Industry: DVD CCA's unspoken theory of movie industry injury appears to be that DeCSS is being used to illegally pirate movies, that these pirated movies cause lost sales of authorized movies, and that these lost sales are an injury peculiar to California. All of these premises are utterly unsupported by any evidence:

- There is no evidence that DeCSS has been used to illegally make pirated movies. It is not necessary to use DeCSS or any other decryption device to create pirate DVD disks. As noted DVD authority Jim Taylor, author of the handbook *DVD Demystified* (2d ed. 2000) and President of the DVD Association, puts it: "Worthy of note is that DVD piracy was around long before DeCSS. Serious DVD pirates can copy the disc bit for bit, including the normally unreadable lead in (this can be done with a specially modified drive), or copy the video output from a standard DVD player, or get a copy of the video from another source such as laserdisc, VHS, or a

² To count as forum contacts supporting jurisdiction, it is necessary of course that any injuries be actual ones that have already occurred, and not potential injuries. There is no doctrine of "anticipatory jurisdiction" that allows a court to base personal jurisdiction on potential contacts between the forum and the defendant that might occur in the future.

camcorder smuggled into a theater. It's certainly true that DVD piracy is a problem, but DeCSS has little to do with it." ("DVD FAQ", § 4.8, available at

<http://www.dvddemystified.com/dvdfaq.html#4.8>.)

- There is no evidence that any illegally pirated movies made using DeCSS have caused any lost DVD sales to the movie industry. DVD disk sales have skyrocketed from 78 million units in 1999 to 364 million units in 2001. The ratio of DVD disk sales to the "installed base" of DVD players has remained stable during that period at about 14.5 disks per DVD player. (Motion Picture Association of America, "2001 U.S. Economic Review," at 30, available at <http://www.mpaa.org/useconomicreview/2001Economic/2001EconomicReview.PDF>.)
- Nor, even if there were evidence of lost sales caused by pirated movies created using DeCSS, would this be evidence that the posting of DeCSS was expressly aimed at California, for at least three separate reasons:
First, notwithstanding DVD CCA's culturally myopic assertion to the contrary, which it makes without any evidentiary support, moviemaking is a worldwide industry, not one peculiar to California. India makes more feature films, about 700-800 a year, than the United States, which makes around 600-700 annually. Europe makes about the same number of films every year as the United States does. Hong Kong alone makes about 130 films a year. (*World Film Production Increases*, SCREEN DIGEST, Dec. 2001, 377-380; *Bollywood: India's Film Industry*, at <http://www.dodona.co.uk/bollywood.htm>; *Profile of Hong Kong*

Major Service Industries, at

<http://www.tdctrade.com/main/si/spfilm.htm>.) Thus, it cannot be said that any act that harms the movie industry generally is expressly aimed at California.

Second, even if DeCSS were being used to make pirated movies that cause lost sales to studios based in California, those lost sales would be occurring not only nationwide but worldwide, and would not be injuries expressly aimed at California. The locus of injury for those lost sales is the place where the lost sale occurs, and the fact that the lost sale may later be reflected in an accountant's calculation at a studio's headquarters in Los Angeles does not transport the injury there. There is no such "corporate headquarters" exception to the due process limitations on jurisdiction; otherwise, the damage caused by the collision between an auto and a Federal Express truck in San Francisco would become an injury occurring in Memphis simply by the happenstance of Federal Express locating its headquarters there. Thus, even if there were evidence that DeCSS had caused lost movie sales, those lost sales would not be evidence that posting DeCSS on the Internet was conduct expressly aimed at causing injury within California.

Third, of the seven major United States film studios (Disney, Fox, MGM, Paramount, Sony, Universal, Warner Bros.), five (Fox, Paramount, Sony, Universal, and Warner Bros.) are owned by companies headquartered outside of California, and it is those out-of-state parent companies that ultimately would feel the effect of any lost sales.³

³ Fox is owned by News Corp. Ltd. of Sydney, Australia; Paramount is owned by Viacom of New York; Sony is owned by Sony Corp. of Tokyo, Japan; Universal is

The Computer Industry: There is no evidence that DeCSS has caused lost sales or other injury to the “computer industry.” DVD CCA has not identified either the companies or the product markets within this enormous and exceptionally diverse worldwide industry that it contends have been injured by the posting of DeCSS on the Internet. Presumably, DVD CCA means to suggest that computer hardware manufacturers who sell personal computers with DVD drives have lost sales because of pirated DVD movies made using DeCSS.

- Again, there is no evidence of DeCSS being used to pirate movies. Nor is there evidence that DeCSS or any pirated movies made with it have caused any lost sales of personal computers with DVD drives or caused lost sales of any other computer industry product. Nor is there any logical reason to expect that pirating of DVD movies would necessarily decrease sales of computers with DVD drives.
- Nor, even if DeCSS were being used to pirate movies and those pirated movies were reducing the sales of personal computers with DVD drives, would that be an injury expressly aimed at California. Notwithstanding DVD CCA’s unsupported assertions to the contrary, the personal computer industry is not an exclusively California one. In October 1999, at the time DeCSS was first posted on the Internet, the three largest personal computer manufacturers in the world were Compaq, Dell, and IBM. (See CNET News.com, “Dell Topples Compaq in U.S. Market Share,” Oct. 25, 1999, available at <http://news.com.com/2100-1001-231851.html>). Compaq and Dell are headquartered in Texas and IBM is headquartered in New York.

owned by Vivendi Universal S.A. of Paris, France; and Warner Bros. is owned by AOL Time Warner of New York.

- Even if movies were being pirated using DeCSS and even if those pirated movies were harming computer industry sales, those lost sales would be occurring nationwide and worldwide and would not be an injury in any way specific to or aimed at California.

The Consumer Electronics Industry: There is no evidence that the posting of DeCSS on the Internet has caused lost sales in the “consumer electronics” industry. Here, too, DVD CCA has made no attempt to identify any specific consumer electronics companies or product markets harmed by the posting of DeCSS on the Internet, much less produced any evidence of such injury. Presumably, DVD CCA means to suggest that pirated movies are being made using DeCSS and that the existence of these pirated DVD movies are harming the sales of DVD players used with televisions.

- As previously noted, DVD CCA has presented no evidence of pirated DVD movies made with DeCSS.
- Nor has DVD CCA presented any evidence that pirated DVD movies made with DeCSS are harming the sales of DVD players or any other consumer electronic product. Sales of DVD players have boomed from four million per year in 1999 when DeCSS was first posted on the Internet to 12.7 million per year in 2001. (Consumer Electronics Association, “2001 Video Product Sales Highlight Digital Revolution,” Jan. 17, 2002, available at http://www.ce.org/press_room/press_release_detail.asp?id=8745; 1997-2002 Consumer Electronics Association DVD Player Sales History, available at <http://www.thedigitalbits.com/articles/cemadvdsales.html>; Motion Picture Association of America, “2001 U.S. Economic Review,” at 30, available at

<http://www.mpa.org/useconomicreview/2001Economic/2001EconomicReview.PDF>.) Nor is there reason to expect that the existence

of pirated movies would necessarily harm the sales of DVD players.

- Nor is there any evidence that the consumer electronics industry in general or the DVD player industry in particular is centered in California. To the contrary, a brief stroll through any Circuit City makes it abundantly clear that those industries, if “centered” anywhere, are centered in Asia. Sony, Panasonic, JVC, Samsung, Toshiba, and Yamaha, all prominent manufacturers of DVD players, are not corporations headquartered in California.
- Even if movies were being pirated using DeCSS and even if those pirated movies were harming consumer electronics industry sales, those lost sales would be occurring nationwide and worldwide and would not be an injury in any way specific to or aimed at California.

The complete absence of evidence of any of these hypothetical harms demonstrates one of the practical difficulties with the Court of Appeal’s decision: by holding that alleged injuries to nonparties are sufficient to support jurisdiction, it will turn the jurisdictional inquiry into a minitrial in which the plaintiff must first prove and the trial court must first find that the nonresident defendant is legally liable to some nonparty resident in California before it can find that it has jurisdiction to decide the defendant’s liability to the plaintiff. That the Court of Appeal here failed to require adequate proof of the alleged harm to nonparties on which its decision hinges only demonstrates its implicit recognition of the impracticality of the inquiry which the logic of its decision demands.

Finally, DVD CCA’s own alleged injuries are insufficient to establish jurisdiction because at the time DeCSS was posted on the Internet in October 1999, DVD CCA had no rights in CSS. DVD CCA did not acquire any rights in CSS until mid-December 1999, just before it filed this lawsuit. (Complaint, ¶ 44.)

Before mid-December 1999, CSS was owned by three Japanese entities: Matsushita Electrical Industrial Co., Ltd. of Osaka, Japan; Toshiba Corp. of Tokyo, Japan; and the CSS Interim Licensing Organization of Osaka, Japan. (DVD CCA's Answer to Special Interrogatory No. 25, 8/10/00 Answers of Plaintiff DVD CCA to Def. Bunner's First Set of Special Interrogatories, reproduced at Ex. 7, 10/28/01 Non-confidential Evidence in Support of Def. Bunner's Motion for Summary Judgment.) Thus, even if the posting of DeCSS were expressly aimed at the owners of CSS, that express aiming would have been directed at Japan, where the owners of CSS were then located, and not at California.

CONCLUSION

Under the Court of Appeal's decision, any injury to any forum resident, party or nonparty, from out-of-state conduct, commercial or noncommercial, by a nonresident defendant is a sufficient contact to justify jurisdiction in the absence of any other contact with the forum, much less any purposeful availment by the defendant of any *benefit* of the forum. The Court of Appeal's reasoning causes its jurisdictional inquiry ultimately to collapse into circularity: In the ordinary case where, unlike here, the plaintiff is a forum resident at the time of injury, the plaintiff's own injuries will constitute the forum contact sufficient for jurisdiction, and jurisdiction will exist simply by virtue of the plaintiff's allegation of injury. Jurisdiction as a practical matter becomes virtually unlimited under the Court of Appeal's decision, and not just in Internet cases but in every case.

In addition to being contrary to well-settled principles of personal jurisdiction for the reasons described above, the Court of Appeal's erroneous and extreme expansion of jurisdiction would result in widespread social harm. "From the publishers' point of view, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to

the Internet can ‘publish’ information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.” *Reno v. A.C.L.U.* (1996) 521 U.S. 844, 853. The rule adopted by the Court of Appeal imposing universal jurisdiction for any harm caused by information published on the Internet would have a chilling effect on speech and commerce on the Internet, as individuals, academic researchers, news organizations, public interest groups, and corporations who publish information on the Internet now must consider themselves subject to suit anywhere by anyone who feels wronged by that information. This would inevitably slow the growth of this vital new medium of communication and commerce.

Nor are the consequences of the Court of Appeal’s errors limited in any way to Internet cases. Its holdings that “purposeful availment” does not require that the defendant seek any benefit from the forum and is satisfied by purely negligent conduct causing harm in the forum are equally applicable to non-Internet cases and will result in California courts being burdened with lawsuits by plaintiffs asserting jurisdiction over nonresident defendants with no connection to California.

For all of these reasons, Amici respectfully requests that this honorable Court reverse the judgment of the Court of Appeal and hold that California lacks personal jurisdiction over Mr. Pavlovich.

Respectfully submitted,

Richard R. Wiebe

Counsel for Amici

PROOF OF SERVICE

I am over the age of 18 years and not a party to this cause. My address is 2140 Ninth Avenue, San Francisco, California, 94116. On the date stated below, I served the following document(s)

BRIEF OF AMICI CURIAE THE STUDENT PRESS LAW CENTER AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER MATTHEW PAVLOVICH

on the person(s) named below

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by, in the case of each person to be served, placing the item(s) to be served in a sealed envelope addressed to that person as stated above with postage fully prepaid, and depositing the envelope on the date stated below in the United States mails in the county of San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date

Richard R. Wiebe

